PD-1445-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-1445-16

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/31/2017
DEANA WILLIAMSON, CLERK

FRED EARL INGERSON, III,
Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

COURT OF APPEALS CAUSE NUMBER 02-11-00311-CR
SECOND APPELLATE DISTRICT OF TEXAS

TRIAL COURT CAUSE NUMBER CR11514
355TH JUDICIAL DISTRICT COURT
HOOD COUNTY, TEXAS

APPELLANT'S BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND TREATISES

NO. PD-1445-16
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APPEAL FROM HOOD COUNTY

APPELLANT'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

In March, 2010, Appellant was indicted for the offense of capital murder for the deaths of Robyn Richter and Shawna Ferris. [RR Vol I: 7-8]. In May, 2011, based on circumstantial evidence, Appellant was convicted of capital murder and sentenced to life in prison. [RR XII: 14, 24].

On appeal Appellant argued, *inter alia*, that the evidence was legally insufficient to support his conviction. In an extraordinarily comprehensive and detailed 73-page opinion, the court of appeals correctly set forth the familiar *Jackson* standard for sufficiency of the evidence, painstakingly reviewed all of the evidence presented to the jury, and then gave a detailed explanation of why the evidence presented was insufficient to convince any rational fact finder beyond a reasonable doubt that Appellant murdered the decedents. *Ingerson v.*

State, No 02-11-00311-CR.[1]

STATEMENT REGARDING ORAL ARUMENT

The State did not request oral argument and the Court did not grant argument.

STATEMENT OF THE CASE

Appellant was convicted of capital murder and sentenced to life imprisonment. [RR XII: 14, 24]. The Second Court of Appeals reversed Appellant's conviction and entered an order of acquittal, holding that the evidence was insufficient to prove that Appellant shot and killed the decedents. *Ingerson v. State*, 508 S.W.3d 703 (Tex.App. – Fort Worth 2016). Justice Walker requested that the Second Court of Appeals hear the case *en banc* because she believed the State would file a motion to consider the case *en banc* which would be granted. *Ingerson*, at 737 (Walker dissent to the denial of motion to hear appeal *en banc*). Justice Walker's motion was denied by a majority of the court. *Ingerson,* at 736. The State's motion for *en banc* consideration was also denied.[2] On April 26, 2017, This Court granted the State's Petition for Discretionary review.

[1]http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=6d9a7392-3475-405b-9dc9-e10adc1b802f&coa=coa02&DT=Opinion&MediaID= a3affe40-c394-4387-bc51-3d22aae63eac

[2]http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=21ac1db4-708a-42c6-b348-67ef5a2857b2&coa=coa02&DT= MT%20ENBANC%20DISP&MediaID=b4220ba2-f754-4895-91cb-f3d223d8dbf2

STATEMENT OF FACTS

(Appellant disagrees with many of the facts presented by the State in its brief. The disputed facts are quite detailed and are tied closely to Appellant's argument. Therefore, to avoid repetition, some facts are presented in the "Argument and Authorities" section of Appellant's brief).

At approximately 8:15 p.m. on June 27, 2008, Appellant was at his house when Robin Richter pulled into his driveway accompanied by Shawna Ferris. [State's Exhibit 154: 16:58:25-16:58:50; State's Exhibit 165: 18:49:45-18:50:15]. Richter and Ferris invited Appellant to go to Miyako's (a restaurant/bar in Hood County, Texas) and have a drink [State's Exhibit 165: 18:49:45-18:50:15; RR IV: 82]. Appellant told them he'd have to meet them there. [State's Exhibit 165: 18:49:45-18:50:15]. When Appellant arrived at Miyako's, Richter and Ferris were already there. [RR. VI: 22-23, 66-67, State's Exhibit 165: 18:51:00-18:51:15]. The three of them sat in the bar and had some drinks. There were several other patrons in the bar, as well as Miyako's employees. [RR VI: 26-27].

At approximately 10:40 p.m., Richer and Ferris left Miyako's and Appellant remained [RR. IV: 102-103; RR. VI: 103-104, 109]. At 11:27 p.m. and 11:35 p.m. Richter called Appellant and, subsequently, she and Ferris returned to Miyako's [RR. IV: 103; RR. V: 247-248]. When they returned, Richter and Ferris stayed in

Richter's vehicle in the parking lot and did not reenter Miyako's. [RR. VI: 109-110, 125].

At approximately 11:45 p.m., after the bar closed, Appellant left the bar with the employees and other patrons [RR. VI: 46-47, 86, 110-111; State's Exhibit 165: 18:54:35- 18:54:40]. At that time, Richter and Ferris were still in the parking lot in Richter's vehicle, a GMC Envoy. [RR. VI: 112-113; State's Exhibit 165: 18:58:40-18:59:05]. Appellant approached Richter's car and engaged in conversation with the two women. [RR. VI: 112-113; State's Exhibit 165: 18:59:10-18:59:15]. At least one person, David Cook, approached Richter's vehicle and had a brief conversation with Appellant, Richter, and Ferris. [RR. VI: 113-114, 118]. Mr. Cook drove out of Miyako's parking lot at approximately 11:55 p.m. [RR. VI: 112]. Appellant was the last known person to be seen talking to the decedents. [RR. VI: 47, 118-120]

Appellant called his girlfriend, Lynn Harper, at about 12:15 a.m. on June 28, 2008 and asked if he could come to her house. [RR. VIII: 92]. Appellant drove from Granbury to Ms. Harper's house in Arlington and arrived at about 1:30 a.m. on June 28, 2008. [RR. VIII: 93]. Appellant stayed at Ms. Harper's until the next morning. [RR. VIII: 94-95].

The morning of Saturday, June 28, 2008, Richter and Ferris were found, deceased, inside Ms. Richter's vehicle. [RR Vol I: 10, 12, 18-19]. Ms. Richter's

SUV was parked outside of Miyako's. [RR. IV: 10, 16-17]. Richter and Ferris each had suffered one fatal gunshot wound to the head. [RR. IV: 12; RR. IV: 200-201, 215, 219-220].

After the police began to investigate the murder of Richter and Ferris, Appellant voluntarily agreed to be interviewed three times by Granbury Police Department detectives and Texas Rangers. [RR. VIII: 151-152, 207; State's Exhibits 154, 154, 165, 198; RR Vol VI: 224]. The first interview occurred the evening of June 28, 2008. [RR. VI: 224; State's Exhibit 165]. Appellant arrived at the police station for the second interview at approximately 3:30 p.m. on June 29, 2008. [RR. VIII: 151-152; State's Exhibits 153, 154]. The third interview occurred on April 1, 2009. [RR. VIII: 207; State's Exhibit 198]. Appellant also gave a written statement at the end of the interview on June 28, 2008. [RR. VI: 229; State's Exhibit 165]. Throughout these interviews, Appellant denied that he committed these murders. [State's Exhibits 153, 154, 165, 198].

Dr. Mark Krouse, a Tarrant County Medical examiner, testified that Richter and Ferris each died of a single gunshot wound to the head. [Vol IV: 200-201, 215, 219-22]. Based upon his knowledge of the totality of the circumstances, including temperature, lividity, blood drying, and his autopsy of the bodies, Dr. Krouse estimated the time of death of the decedents at somewhere between 9:00 p.m. on June 27th and 2:00 a.m. on June 28th. [RR. IV: 227-228].

Ms. Richter was involved in a dating relationship with Mohammed "Mo" Sylla. [RR. V: 168, 182-183]. Ms. Richter had told at least one person that she "liked him a lot." [RR. V: 168]. Mr. Sylla testified that he had feelings for Richter but looked at their relationship more like friendship. [RR. VII: 85]. Mr. Sylla believed that Richter "looked at it as something a little more." [RR. VII: 85].

On June 27, 2008, Mr. Sylla was driving home to Granbury from Louisiana. [RR. VII: 95]. Mr. Sylla testified that Casey Turner and Kristina Scott were at his apartment waiting for him. [RR. VII: 92-93, 95]. Mr. Sylla indicated he had stronger romantic feelings for Ms. Turner than he had for Ms. Richter and he had engaged in sexual relations with Ms. Turner on one occasion. [RR. VII: 77, 98]. When Mr. Sylla arrived at his apartment in Granbury, Ms. Turner and Ms. Scott were there. [RR. VII: 98]. According to Mr. Sylla, he arrived at his apartment in Granbury around 11:00 or 11:30. [RR VII: 99]. The cell tower records confirmed that he was in the Granbury area at 11:16 p.m. [RR. VII: 62]. On June 27, 2008, Mr. Sylla drove a beige, or sand, colored Cadillac Escalade. [RR. VII: 119].

Casey Turner testified that she was at Mr. Sylla's Granbury apartment when he returned home on June 27, 2008. However, she was adamant that she had not ever had a sexual or intimate relationship with Mr. Sylla. [RR. VII: 154].

Ronnie Curry was a security guard working at Comanche Peak nuclear power plant. [RR. IX: 239]. He did not know Appellant or anyone else associated

with Appellant's case. [RR. IX: 246-247]. On June 27, 2008, Mr. Curry clocked out of work at 11:24 p.m. and drove out of the parking lot at 11:45 p.m. to 11:50 p.m. [RR. IX: 244, 248-250]. Mr. Curry's route to, and from, work took him past Miyako's. [RR. IX: 244-245]. Mr. Curry passed the Miyako's parking lot between 12:05 p.m. to 12:20 p.m. [RR. IX: 257]. At that time, Mr. Curry observed a vehicle parked in front of Bear's Plumbing (the business immediately to the right of Miyako's) that was "lit up" by a spotlight in the parking lot. [RR. IX: 253; State's Exhibits 9, 67]. Mr. Curry described the vehicle as a light colored General Motors "SUV type of vehicle," "like a Tahoe." [RR IX: 255-256]. Mr. Curry agreed that a Tahoe and an Escalade are "similar vehicles." [RR: IX: 256]. Mr. Curry testified that he did not see a dark Mazda SUV (Appellant's vehicle at the time) in the parking lot when he drove by. [RR. IX: 258; State's Exhibit 45-46, 178].

In the early morning hours of June 28, 2008, Steven Gomez and Joseph Morvan had gone to Jack-in-the-Box near Mayako's. [RR. IX: 189-191; State's Exhibit 158]. Mr. Gomez and Mr. Morvan took their food and drove to Mr. Gomez's mother's house. [RR. IX: 188-190]. Mr. Gomez estimated that his mother's house was 150 to 300 yards from Miyako's. [RR. IX: 192]. The two men remained outside, on or near Mr. Morvan's truck, and ate their food. [RR. IX: 192-193]. Sometime between 1:00 a.m. and 1:30 a.m., Gomez and Morvan heard

gunshots coming "directly from Miyako's direction." [RR. IX: 197-198, 226]. Mr. Morvan testified that he was familiar with firearms and knew what a "discharging firearm sounds like." [RR. IX: 217].

On June 27, 2008, Tiffany Rosenquist, Stephanie Ferguson, and Loren Tuggle were working at Arbor House, an assisted living facility for Alzheimer's patients located near Miyako's. [RR. X: 7-12, 18, 26-28]. At approximately 9:45 p.m., during a smoke break, the three women heard what could have been fireworks or gunshots coming from the direction of Miyako's. [RR X: 8-11, 18-19, 27-28]. Ms. Rosenquist testified that she did not hear any other loud noises before or after that time on June 27 or June 28. [RR: X: 15]. Ms. Tuggle got off work and was walking to her car between 12:00 a.m. and 12:10 a.m. on June 28, 2008. She did not hear any gunshots, fireworks, or "bangs" coming from the direction of Miyako's at that time. [RR. X: 30-31].

During the investigation of the murders of Richter and Ferris, several people confessed to killing them. One of these individuals was affiliated with Aryan Circle or Aryan Brotherhood. [RR. IV: 86, 129]. Without much investigation, the detectives decided this was a not a lead worth pursuing. [RR. IV: 129-130]. Another individual, Christopher Tibbs, also confessed to the murders. [RR. IV: 131]. Mr. Tibbs was contacted by two Rangers regarding his confession. [RR. IV:

131]. Because Mr. Tibbs was upset, crying, and apologetic, the investigating officers decided he was not involved in the murders. [RR. IV: 131]

STATE'S ISSUE RESTATED

In a capital case, did the two-justice panel fail to defer to the verdict, apply defunct sufficiency standards, and ignore inculpatory evidence when Appellant was the last person with the victims, had been rejected by them, fled the scene, had a .38 –the likely weapon- under his car seat the day after, had gun-shot residue on his pants and car seat, and acted suspiciously?

SUMMARY OF THE ARGUMENT

The Court of Appeals opinion correctly set forth the appropriate standard of review for legal sufficiency. The court of appeals also correctly stated the law concerning circumstantial evidence and appropriate inferences as that law applies to the State's burden to prove its case beyond a reasonable doubt.

The State mischaracterizes the record in many regards and, therefore, this court should dismiss the State's petition for discretionary review as being improvidently granted. Alternatively, this Court should affirm the court of appeals as their opinion is based upon sound legal principles properly applied to the facts.

The testimony and evidence does not support the theory that Appellant and one of the murder victims were involved in a romantic relationship. Nor is there

any testimony from the eyewitnesses that Appellant was upset or angry with the victims immediately prior to the murders.

There is no direct or circumstantial evidence linking Appellant to the potential murder weapon at the critical time in question: the night of the murders. A sole witness's description of a gun in Appellant's vehicle the day after the murders does not match the potential murder weapon.

There is no biological evidence connecting Appellant to the murders. The Appellant's behavior after the murders and during his interviews with the police officers is not suspicious. Appellant did not flee the scene in a panic and he did not avoid questioning by the police officers.

Taken in its totality, the evidence in Appellant's case supports, at best, a strong suspicion that he committed the murders for which he was convicted. Anything beyond that is mere speculation.

ARGUMENT AND AUTHORITIES

I. STATE'S PETITION SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. Principles Governing Discretionary Review in this Court

Discretionary review "is not a matter of right, but of the Court's discretion," TEX. R. APP. P. 66.2. This Court has held that it:

> should reserve its discretionary review prerogative, for the most part, to dispel any confusion generated in the past by our own case

> law, to reconcile settled differences between the various courts of appeals, and to promote the fair administration of justice by trial and appellate courts throughout Texas. *Arcila v. State*, 834 S.W.2d 357, 361 (Tex.Crim.App. 1992), *overruled on other grounds by Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997).

Typically, this Court does not review factual issues such as sufficiency of the evidence but instead focuses on legal issues with broad import to Texas criminal jurisprudence. *See*, *e.g.*, GOLDSTEIN, PETITIONS FOR DISCRETIONARY REVIEW, 2013 Dawson Conference on Criminal Appeals at 9 ("Challenges to the sufficiency of the evidence ... are rarely successful issues to raise in a PDR."); BURNETT & PAUL, POST-DECISION APPELLATE PRACTICE, State Bar of Texas Criminal Appellate Manual F-1 at 19 ("Fact-bound issues, such as the sufficiency of the evidence ... are less likely to be reviewed. Although such claims are encompassed within the Court's subject matter jurisdiction, typically they will not be deemed to have sufficiently compelling future application to warrant discretionary review."); MCMINN, PETITIONS FOR DISCRETIONARY REVIEW, Ch. 35 2013 Advanced Criminal Law Course at 4 ("In a nutshell, the Court is looking for issues that are important to the jurisprudence of the State. The Court's primary role is not to correct every mistake made by the courts of appeals. As the court of last resort, its role is to be the caretaker of Texas criminal law. As a result, it is more interested in legal issues than factual issues.").

B. Analysis

None of the concerns expressed in the State's petition justify an exercise of this Court's discretionary review. In a detailed examination of the testimony of every witness called by each side, the court of appeals conducted an exhaustive review of all of the evidence presented in the trial court. *See Ingerson v. State*, 508 S.W.3d 703, 704-729 (Tex. App.–Fort Worth 2016). The court of appeals then specifically summarized and analyzed all of the evidence singled out by the State as circumstantially proving Appellant had committed the charged offense beyond a reasonable doubt. *See Ingerson*, at 730-736. Appellant respectfully submits that this constitutes as thorough a summary of the evidence as could have been conducted by the court of appeals.

The court of appeals correctly set forth the appropriate standard of review for legal sufficiency. The court of appeals also correctly stated the law concerning circumstantial evidence and appropriate inferences as that law applies to the State's burden to prove its case beyond a reasonable doubt. *See Ingerson* at 730.

Contrary to the State's assertion that the court of appeals applied a "defunct sufficiency standards," (*See* State's Issue, p. i of State's Brief on the Merits), the court of appeals cited the correct controlling cases when it noted:

> In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and

> reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Powell v. State*, 194 S.W.3d 503, 506 (Tex. Crim. App. 2006); *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). The reviewing court must give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at318–19, 99 S.Ct. 2781. In reviewing the sufficiency of the evidence, we should look at "events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Cordova v. State,* 698 S.W.2d107, 111 (Tex. Crim. App. 1985). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993) ("[i]t is not necessary that every fact point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances."); *Barnes v. State*, 876 S.W.2d 316, 321 (Tex. Crim. App. 1994); *Alexander v. State*, 740 S.W.2d 749, 758 (Tex. Crim. App. 1987). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Guevara*, 152 S.W.3d at 49. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. *Id.*
> *Ingerson*, at 730 (citing *Hooper v. Sta*te, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

The court of appeals correctly addressed the difference between a reasonable conclusion, speculation, and a presumption. The court stated:

> And while juries are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *See, e.g.*, *Megan Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). " '[A]n inference is a conclusion reached by considering other

> facts and deducing a logical consequence from them,' while '[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.' " *Id.* (quoting *Hooper*, 214 S.W.3d at 16).
>
> *Ingerson*, at 735-736.

The court accurately defined a presumption as "a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. *See* TEX. PENAL CODE § 2.05." *Ingerson,* at 731, (quoting *Hooper*, 214 S.W.3d at 16).

After painstakingly detailing the evidence presented at trial and outlining the proper sufficiency standards, the court of appeals stated: "we make it clear that our sufficiency review encompassed the cumulative force of all of the circumstantial evidence and the reasonable inferences supportable from that evidence viewed in the light most favorable to the State." *Ingerson*, at 736. The court of appeals then held:

> "after reviewing all of the circumstantial evidence and any reasonable inferences from that evidence, the evidence is insufficient to convince any rational fact finder beyond a reasonable doubt that [Appellant] did intentionally or knowingly cause the death of an individual, Robyn Richter, by shooting her with a firearm and did intentionally cause the death of an individual, Shauna Ferris, by shooting her with a firearm. *See Ingerson*, at 736.

Given the comprehensive review of the record, with particular emphasis on the arguments set forth in the State's brief, and the correct statements of the applicable legal standard and principles, the State's argument, boiled down to its essence, is nothing more than that the court of appeals "managed to get it wrong"

which does not justify an exercise of this Court's discretionary review. *See Arcila*, 834 S.W.2d at 361.

1. State's Mischaracterization of Key Facts

The State grossly mischaracterized the testimony in Appellant's case in several key areas: These include:

- Appellant's relationship with Richter;
- Appellant's demeanor and actions towards Richter and Ferris the night of the murders;
- Attributing ownership of the type of gun and ammunition used in the murders to Appellant;
- Characterizing Appellant's behavior after the murders as suspicious; and,
- Appellant's statements during his multiple interviews with law enforcement.

a. Appellant's Relationship with Richter

The State describes Appellant's relationship with Richter as "strained" and one in which Appellant's romantic advances were spurned by Richter. [*See* State's Brief, p. 3, 4-7, 17]. The record does not support these descriptions.

The State misquotes the record when they say Appellant "admitted Richter treated him 'like a dog and embarrassed, talked down to, and belittled him.'" [*See* State's Brief, p. 7]. During an interview with the police on June 29, 2008, one of the officers asked Appellant several times if Richter ever "treated him like a dog"

or "embarrassed him." [State's Exhibit 154 at 17:19:00 – 17:20:30]. Despite the officer's continued pressing on this issue, Appellant consistently denied that it ever happened. [State's Exhibit 154 at 17:19:00 – 17:20:30]. The officer saying this is very different than Appellant saying it. This would be a persuasive piece of evidence had Appellant actually said that Richter "treated him like or dog" or "embarrassed him." The reality is that, even under great pressure from the interviewing detective, Appellant never made such a statement or adopted this position. The State's reference to the Appellant saying these things (as cited in the State's brief at p. 7, f.n. 22) is entirely false.

Nor did Appellant indicate that Richter made him feel "like a mark and explained he decided not to be romantically involved with her because of her dubious intentions." [*See* State's brief pp. 6-7, f.n. 19]. At the location on the videotaped interview cited by the State, Appellant told the detectives and Rangers that he and Richter had a discussion and, mutually, agreed to be "friends." [State's Exhibit 154: 16:40:00-16:41:00, 17:19:00 - 17:20:00].

There was testimony during Appellant's trial from S.L., a 19-year old (at the time of trial) girl who Richter was attempting to adopt at the time of her death. [RR. V: 159, 164]. According to S.L., Richter told her that she was "going to be nice" to Appellant and see if he would loan her $10,000 or $15,000 to make her appear financially stable during the adoption process. [RR. V: 166]. Richter

further told S.L. that she was going to return the money to Appellant after the adoption process was completed. [RR. V: 166]. Rose "Sissy" Cardwell testified that Richter told her that Appellant had actually given her $10,000 for this purpose. [RR. VI: 208]. Appellant repeatedly denied that he ever gave any money to Richter. [State's Exhibit 153: 15:42:00-15:42:25; State's Exhibit 154: 16:38:15-16:39:00; 17:15:40-17:16:00, 17:17:00-17:18:30]. Richter's bank records, which the State obtained with a subpoena, showed that Appellant was being truthful on this point and Richter was not. [RR. Vol VI: 213-216; RR. IX: 32-33; Defendant's Exhibit 2].

The State attempts to buttress their description of the relationship between Richter and Appellant with statements allegedly made by Appellant during his interviews with law enforcement officers. However, Appellant never described his feelings for Richter as anything other than friendly. [State's Exhibit 154: 16:40:00-16:41:00, 17:19:00-17:20:00]. Over the course of his many hours of interrogation by the detectives and Texas Rangers, Appellant never indicated that he had any romantic feelings for Richter. [*See* State's Exhibits 153, 154, 165].

Two State's witnesses, S.L. and Ms. Cardwell did testify to statements made by Richter to the effect that Appellant wanted a romantic, sexual relationship and Richter did not. [RR. V: 167; RR. V: 206]. During his interviews, Appellant repeatedly denied that he had such interests in Richter. [State's Exhibit 153:

15:50:10-15:50:25; State's Exhibit 154: 16:36:00-16:36:20; 16:40:00-16:41:00, 17:19:00-17:20:00]. Richter's daughter, M.C, testified that Richter talked about Appellant "a little bit" but she didn't know if Appellant and Richter had ever been on a date. [RR. V: 130]. S.L.'s brother, T.L., testified that he had "very close contact" with Richter in the months just before her death and Richter described her relationship with Appellant as "more of a friend" and "on a friend basis." [RR. V: 182-183].

The State places a good deal of significance on the fact that Appellant and Richter had frequent cell phone contact in the two months prior to the murders. [*See* State's Brief, p. 4]. However, the State's cell phone records expert, Adam Unnasch, testified that, in the case of Richter's records, a text would count as one minute. [RR VII: 16]. Mr. Unnasch additionally testified that he could not tell, as far as duration was concerned, the percentage of contact between Appellant and Richter that was calls versus text messages. [RR. VII: 58]. In today's world, with everyone on their cell phones all the time, the amount of contact between Appellant and Richter does not lead to the inference that Appellant had romantic feelings for Richter.

Other than one text message from Richter to Appellant, there is no indication as to the content of the cell phone contact between the two. Based upon this one text, it appears more likely Richter was the one interested in a romantic

relationship. Several hours before she was murdered, Ms. Richter sent a text to Appellant (and another person, Mo Sylla) of her "cleavage or breasts" with the caption "Yes, they miss you, too." [RR. IV: 124-125; V: 232-233]. Nowhere in the record does it indicate that Appellant had ever reciprocated by sending sexually provocative pictures of himself to Richter.

b. Appellant's Demeanor and Actions Towards Richter and Ferris the Night of the Murders

The State argues that Appellant's actions and demeanor in the hours just before Richter and Ferris were murdered show that he was upset with them. The eyewitness testimony at Appellant's trial paints a different, polar opposite, picture.

Souligna "Tom" Soupradith testified that he was employed at Miyako's as a sushi chef. [RR. VI: 38]. Mr. Soupradith identified Appellant as a "regular" at Miyako's. [RR. VI: 40-41]. On June 27th, 2008, Mr. Soupradith observed Appellant and two women at Miyako's "having a conversation.". [RR. VI: 42]. At some point, Mr. Soupradith heard Appellant say, "Fucking Niggers." [RR VI: 44]. The two women didn't appear to "pay any attention" to this statement by appellant and, certainly, were not offended by it. [RR. VI: 45]. There is absolutely no indication as to who, or what, Appellant was referencing when he made this comment. Contrary to the State's assertion, the witness testimony does not indicate that Appellant "made a spectacle of himself" when he made this comment. [*See* State's Brief, p. 17]. Additionally, it is pure speculation on the part of the

State to conclude that Appellant's comment had anything to do with his alleged jealousy of Richter's relationship with Mo Sylla. [*See* State's Brief, p. 17].

Based upon his past experience with Appellant, Mr. Soupradith stated that Appellant sometimes used the "F word" and the "N word." [RR. VI: 46]. When he did, the employees at Miyako's would usually "kind of blow it off." [RR. VI: 46]. In fact, that kind of language was "common, normal, everyday occurrence" at the Miyako's bar from customers other than Appellant. [RR. VI: 54-55].

Thomas Sawyer testified that he was a server and bartender at Miyako's. [RR. VI: 65]. On June 27, 2008, Mr. Sawyer saw Appellant enter the bar and sit down with "two ladies" who looked like they were "waiting to meet him there." [RR. VI: 67]. While Richter was in the bathroom, Sawyer overheard Ferris say to Appellant "that would not be all right, because she is like a sister to me." [RR. VI: 68]. Mr. Sawyer did not know what Appellant said to Ferris to illicit this response but Ferris was not offended by it. [RR. VI: 70]. As far as Sawyer could tell, Appellant's remark could have been as innocent as asking Ferris to lunch the next day. [RR. VI: 70].

Brandon Krider testified that he was bartending at Miyako's the night of June 27, 2008. [RR. VI: 76-77]. At about 9:30, Krider observed Richter and Ferris at the bar "having a good time." [RR VI: 78]. At some point, Krider observed the interaction between Appellant and Richter and Ferris. [RR. VI: 85].

When one of the other patrons indicated that Richter had "groped him," Appellant chastised Richter. [RR. VI: 85]. Mr. Krider did not describe Appellant as animated, upset, or angry during his interaction with Richter and Ferris. In fact, Krider did not see "anything out of the ordinary about the interaction" between Appellant and Richter and Ferris that night. [RR. VI: 95].

David Cook was in Miyako's bar the night of June 27, 2008. [RR. VI: 97]. Richter and Ferris were flirting with him and, eventually, Richter approached him and grabbed his crotch. [RR. VI: 102-103]. Richter did this in front of the other people at the bar. [RR. VI: 103]. Appellant did not appear to be upset by this. [RR. VI: 123-124]. Mr. Cook stated, at some point in the evening, Richter and Ferris left Miyako's and Appellant stayed. [RR. VI: 103-104, 109]. Mr. Cook testified that he had a conversation with Appellant at that point; just "normal bar banter." [RR. VI: 104].

Mr. Cook became aware that Richter and Ferris were coming back to Miyako's. [RR. VI: 109]. Another witness, Detective Russell Grizzard, testified that Richter called Appellant before returning to Miyako's. [RR IV: 103]. The women did not come back inside the bar when they returned. [RR. VI: 109-110]. Mr. Cook saw them pull into the parking lot. [RR VI: 125].

Appellant left the bar with the employees and other patrons after the bar closed. [RR. VI: 46-47, 86, 110-111; State's Exhibit 165: 18:54:35- 18:54:40]. At

that time, Richter and Ferris were in the parking lot in Richter's car. [RR. VI: 112-113; State's Exhibit 165: 18:58:40-18:59:05]. Appellant approached Richter's car and was engaged in conversation with the two women. [RR. VI: 112-113; State's Exhibit 165: 18:59:10-18:59:15]. The State places importance on Appellant saying the girls were playing "jigaboo" music. [*See* State's Brief pp. 9-10]. In reality, in Appellant's first interview, he describes the music as "dance music, jigaboo music, or whatever you call it." [State's Exhibit 165: 19:08:00- 19:08:17]. Furthermore, Appellant had earlier provided Richter a DVD containing this exact kind of music. [State's Exhibit 153: 15:44:00-15:44:20]. Appellant's demeanor when describing this music does not show any animosity towards Richter or appear to be derogatory. [State's Exhibit 153: 15:44:00-15:44:20].

David Cook, the person who had been groped by Richter, went over to Richter's car in the parking lot and spoke with Appellant and the two women. [RR. VI: 113-114, 118]. This was at about 11:50 to 11:55 p.m. [RR. VI: 128]. Mr. Cook did not observe any animosity or tension between Appellant and Richter and Ferris in the parking lot. [RR. VI: 128]. Mr. Cook drove out of Miyako's parking lot at approximately 11:55 p.m. [RR. VI: 112]. At about the same time, Mr. Soupradith also drove out of the parking lot. [RR. VI: 47] At that time, Appellant was still in the parking lot talking to Richter and Ferris. [RR. VI: 47].

c. Attributing Ownership of The Type of Gun and Ammunition Used in The Murders to Appellant

The State's assertion that Appellant "had a .38 –the likely weapon – under his car seat the day after" (*See* State's Brief, issue Presented, p. i) is a misstatement of the testimony in Appellant's case. The State correctly notes that the weapon used to murder Ms. Richter and Ms. Ferris was never found. [RR. IV: 51, 108; IX: 18]. The State's theory at trial, on direct appeal, and now before this Court, is Appellant used a .38 caliber pistol that he purchased in Indiana while living there with his ex-wife. [*See* State's Brief, pp. 14, 22-23; RR. X: 53, 104].

A fired bullet was recovered from inside Ms. Richter's vehicle. [RR. IV: 253-254; State's Exhibit 54]. DNA testing on this bullet showed that it was consistent with Ms. Ferris' DNA. [RR IV: 258]. Calvin Story, the State's ballistics expert, testified that he conducted testing on this bullet in an attempt to identify the caliber and type of firearm that fired the bullet. [RR. V: 21-24]. Mr. Story identified the bullet as weighing 130 grains. [RR. V: 51]. Mr. Story stated that his examination "suggests" the bullet was fired from a Colt .38 or .357 revolver. [RR. V: 25]. Either caliber was just a likely and he could not "rule one out or say one to the exclusion of the other." [RR. V: 73]. Mr. Story placed great weight on the fact that the rifling from the barrel had imparted a left twist on the bullet, a distinct characteristic of Colt firearms (as opposed to other manufacturers such as Smith and Wesson or Ruger). [RR. V: 25]. Mr. Story's report states "[A] list of possible

firearms would include, but not be limited to, .38 Special and .357 Magnum Colt revolvers and .38 Super (Auto) Colt pistols." [State's Exhibit 56]. Mr. Story's opinion was that the recovered bullet could have been fired from any .38 or .357 Colt revolver currently present in the United States. [RR. V: 67].

While the investigation was ongoing, a Colt .38 Special Cobra revolver was seized in Granbury, Hood County (on an unrelated arrest) from David Hill. [RR. IV: 70-71]. Mr. Story test-fired this gun and then compared the fired bullets to the recovered bullet. [RR V: 42-43]. Based upon his examination, Mr. Story found the following similarities between the test-fired bullets and the recovered bullet:

1) the caliber matched;
2) the Cobra imparted a left twist and, therefore, matched;
3) the number of lands and grooves matched; and,
4) the widths of the lands and grooves matched. [RR. V: 42-43]

Ultimately, Mr. Story gave his opinion that he could not "eliminate" or "identify" the recovered bullet as having been fired from David Hill's Colt Cobra. [RR. V:43-44; State's Exhibit 58]. In layman's terms, Mr. Hill's handgun was not "positively ruled out" as the murder weapon. [RR. IV: 106].

James Elrod testified that he sold Appellant a Colt .38 Special with a bobbed hammer in 1999. [RR. IV: 149-151; 169-170, 176]. Mr. Elrod further described the gun he sold as "not having a hammer." [RR. IV: 178]. It did not have the normal hammer that sticks out; it "doesn't have a place for you to grab with your thumb and pull back." [RR IV: 177]. This gun was "stainless" or "silver." [RR.

IX: 50]. Prior to selling the gun to Appellant, Mr. Elrod had fired it into a dirt pile in Indiana. [RR. IV: 179]. Mr. Elrod indicated it was likely that he fired wadcutters from the gun into the dirt pile. [RR. IV: 181]. Mr. Elrod described wadcutters as cheap ammunition that are "pure lead." [RR IV: 181]. At some point during the investigation, Det. Russell Grizzard and Ranger Danny Briley went to Indiana and retrieved 22 fired rounds from the dirt pile that into which Mr. Elrod indicated he fired the .38 Special before he sold it. [RR. IV: 80-81].

Calvin Story examined these 22 fired rounds and found they were not fired from the same gun as the bullet recovered from Richter's vehicle. [RR. IV: 81; RR. V: 53-54; State's Exhibit 59]. The State's insinuation that wadcutters are inappropriate for comparison is a misstatement of the testimony. [*See* State's Brief, p. 23]. Mr. Story's testimony does not support this position. In fact, Mr. Story indicated that the barrel of a gun leaves identifying marks on a bullet because the barrel is made of steal and the bullets are made of a much softer material, lead. [RR. V: 38].

Contrary to the State's assertion, Appellant did not retrieve any 130-grain bullets from his ex-wife when he retrieved a handgun from her sometime after 2005 (most likely in 2006) (*See* State's Brief, p. 22). [RR. IV: 238-239, 242]. In fact, the record indicates just the opposite. Appellant's ex-wife, Sharon Hutcheson, testified that she gave the gun to Appellant but removed all bullets

before doing so. [RR. IV: 239-240]. She was adamant in her testimony that she did not give Appellant any bullets when she gave him the gun [RR. IV: 240].

On July 8th, 2008, Texas Ranger Joe Hutson traveled to Indiana and retrieved the six unfired cartridges from Ms. Hutcheson. [RR. IV: 231-240; State's Exhibit 30]. Mr. Story, the State's ballistics expert, was unable to connect these six unfired cartridges to the recovered bullet in any manner. [RR. V: 70; State's Exhibit 56]. Mr. Story could not even say if the six unfired cartridges were made by the same manufacturer as the recovered bullet. [RR. V: 70]. Mr. Story did testify that one of the six unfired bullets weighed 130 grains. [RR. V: 52]. Mr. Story elaborated that 130-grain, .38 caliber bullets are "very common" and could be purchased "pretty much anywhere that sells ammunition." [RR. V: 70]. Therefore, the State's trial expert contradicts the State's position before this Court that 130-grain bullets are "somewhat of an anomaly." (*See* State's Brief, p. 22).

The State misconstrues the testimony of Scott Wayman, the Kwik Kar employee who testified that he saw a gun in Appellant's car on June 28, 2008. Appellant took his car to the Kwik Kar in Granbury that day for an oil change and "full service." [RR. VIII: 10-11; State's Exhibit 152]. Appellant lived across the street from Kwik Kar and took his car in for service approximately once a month, dating back to September, 2007. [RR. VI: 196-198; 249-250; State's Exhibit 152]. On June 28, 2008, Scott Wayman was the Kwik Kar tech who serviced Appellant's

vehicle. [RR. VIII: 10-11]. In August, 2008, Mr. Wayman was interviewed by a Texas Ranger regarding what he observed in Appellant's car. [RR. VIII: 9, 12-14].

Mr. Wayman testified that he saw a gun "underneath the driver's seat." [RR. VIII: 16]. Mr. Wayman indicated he was familiar with guns because his dad, a Marine, taught him about them. [RR. VIII: 35]. Mr. Wayman described this gun, to the Ranger and to the jury, as a ".38 or maybe a .357" revolver with the letters "S and W" stamped on the grip. [RR. VIII: 20, 22, 39]. Mr. Wayman identified that as being a Smith and Wesson revolver. [RR. VIII: 39]. During the August, 2008 interview with the Ranger, Mr. Wayman drew a picture of the gun that he saw in Appellant's vehicle. [RR. VIII: 29-30; State's Exhibit 172]. The picture Mr. Wayman drew is not a bobbed hammer revolver; the gun he drew has a distinct hammer. [RR. VII: 41; State's Exhibit 172]. Consistent with his drawing, Mr. Wayman testified that he could clearly see the hammer. [RR VIII: 39, 41-42]. Mr. Wayman indicated he knew the difference between a hammerless gun and a gun with a hammer. [RR. 45-46].

In April 2009, Ranger Briley interviewed Mr. Wayman again and showed two "photocopies of some photographs;" one of a revolver and one of a semiautomatic pistol. [RR. VIII: 23, 24, 43-44; State's Exhibits 170, 171]. Mr. Wayman picked the revolver as looking "more like" the gun he saw under Appellant's seat. The gun Mr. Wayman picked clearly had a hammer, just like the

one he saw in Appellant's vehicle. [RR. VIII: 43]. That same date, Ranger Briley took Mr. Wayman to Cabela's and asked him to pick out "anything that kind of looks like it." [RR VIII: 27]. Mr. Wayman chose three revolvers that "kind of looked like" the gun he saw in Appellant's car. [RR. VIII: 191-193]. None of the Cabela's guns chosen by Wayman were silver or stainless and, therefore, were not the same type of gun that Appellant purchased from Mr. Elrod in 1999. [RR. IX: 50-51]. The Cabela's guns were "just similar" to Mr. Elrod's gun. [RR. IX: 51] Whatever guns Mr. Wayman identified at Cabela's as "kind of looking like" the gun he saw in Appellant's vehicle almost a year earlier, the record is clear he was consistent in his testimony that the gun he saw was a Smith and Wesson with a distinct hammer. [RR. VIII: 20, 22, 39, 41-42; State's Exhibit 172].

The State misconstrues the testimony of Michael Propst and Melissa Russell. Mr. Propst, a friend of Appellant's, testified that he was at Appellant's house in "June or July of 2006" when Appellant had returned from Indiana with some of his belongings. [RR. VIII: 76-77]. As Appellant was unloading his Mazda, Mr. Propst observed a gun case for a handgun. [RR. VIII: 77-78]. When Mr. Propst asked Appellant what it was, Appellant replied that it was a .38. [RR. VIII: 78]. Ms. Russell testified that she saw a silver revolver in a towel in the cargo area of Appellant's vehicle in December, 2007. [RR. VIII: 52]. However, Ms. Russell told Ranger Briley she did not know if the handgun was a revolver or an automatic.

[RR. IX: 57]. The State's assertion that "it was reasonable to infer that Appellant carried a gun in his vehicle" does not lead to the rational inference that Appellant was in possession of "the murder weapon" the night Richter and Ferris were killed. [*See* State's brief, p. 22].

Having a handgun in your vehicle in Texas is certainly not unusual. The remoteness in time of these incidents, with reference to the date of the murders, certainly does not lead to a rational conclusion that either of these was the murder weapon. Nor is there any way to rationally conclude that Appellant was still in possession of either of these guns on June 27, 2008. Furthermore, there is no forensic evidence linking any guns attributed to Appellant to the murder weapon.

d. Appellant's Behavior After the Murders

On June 27, 2008, Appellant was dating Lynn Harper. [RR. VIII: 88]. He had been dating her, and seeing her regularly, since January, 2008. [RR. VIII: 89]. Ms. Harper lived in Arlington and Appellant had been to her house on numerous occasions throughout their relationship. [RR. VIII: 89-90]. Ms. Harper's testimony directly contradicts the State's assertion that she and Appellant had not planned for him to come to her house on the night of June 27, 2008. [*See* State's Brief, p. 10-11, 26]. The two of them had talked several times on the phone that evening and they discussed Appellant coming to her house after he had worked on his home office and then gotten something to eat. [RR. VIII: 90-91]. It's true that

they had not "firm[ed] anything up" during their phone calls, but they had planned for Appellant to call Ms. Harper later that night. [RR. VIII: 91]. Appellant did, in fact, call Ms. Harper at about 12:15 a.m. on June 28, 2008 and asked if he could come to her house. [RR. VIII: 92]. Appellant arrived at Ms. Harper's house at about 1:30 a.m. on June 28, 2008. [RR. VIII: 93]. The State's attempt to paint this call as an aberration is misplaced. [*See* State's Brief, pp. 11, 26]. When asked about the call, Ms. Harper testified that Appellant had "probably" not previously called her "quite that late." [RR. VIII: 94]. That is a far cry from saying she was "surprised" by his call. [*See* State's Brief, p. 26].

The Appellant did not ignore the police officer's request to talk to him as alleged by the State. [*See* State's Brief, p. 26]. At the beginning of Appellant's first interview on June 28, 2008, Det. Haught apologized to Appellant for making him wait. [State's Exhibit 165: 18:47:30-18:47:00]. That is not a statement the detective would have made if Appellant "ignored" his request to come to the station.

The State references a video of Appellant allegedly "fleeing in his vehicle" and describes his driving as "panic, disorientation, and flight." [*See* State's Brief, pp. 18, 25]. Additionally, the State alleges that Appellant "vacillated between admitting that 'could have happened' and denying it." [*See* State's Brief, pp. 25-26]. To say that there is a video showing Appellant "fleeing" is

speculative, at best. State's Exhibit 1 is a surveillance camera from the Little Miracles Daycare Center. [RR. III: 214-215]. It covers a time period from 11:30 p.m. on June 27, 2008 to 12:30 a.m. on June 28, 2008. [RR. III: 215, 219]. Assuming the jury inferred the vehicle identified by the State as Appellant's was, in fact Appellant's, there is simply nothing "panic[ked]" or "disoriented" about the way the vehicle was driven. [*See* State's Brief, p. 18; State's Exhibit 1: 00:02:12-00:02:40]. The car is not moving exceptionally fast, it doesn't screech to a halt, and it makes a normal turn after it backs up. [*See* State's Exhibit 1: 00:02:12-00:02:40].

On April 1, 2009, Ranger Briley and Det. Grizzard confronted Appellant about his allegedly driving "pretty fast" and missing his turn on the way home from Miyako's the night of the murders. [State's Exhibit 198: 23:05-24:11]. Driving "pretty fast" is hardly fleeing. Additionally, contrary to the State's assertions, Appellant did not deny doing this. Appellant states that it could have been him and it might have happened. [State's Exhibit 198: 23:05-24:11]. Appellant goes on to say that he has missed his turn at that intersection in the past. [State's Exhibit 198: 23:05-24:11]. Ranger Briley claims that Appellant denied this event when the officers were serving a search warrant at Appellant's house. [State's Exhibit 198: 23:05-24:11]. However, there is no recording of that conversation.

e. Appellant's Recorded Interviews with Police

Contrary to the State's assertion regarding Appellant's demeanor, he acted appropriately during his interviews with the police for someone who had not committed these murders. He was calm, patient and offered to help them with whatever they needed. [State's Exhibit 154: 17:06:20-17:06:25; 165: 19:55:25-19:55:45]. This is especially remarkable given the fact that Ranger Briley spent the majority of his 50-minute interview in Appellant's face with his legs between Appellant's. [State's Exhibit 153]. During his interview on June 29, 2008, Appellant asked the officers to "get his phone records" and to get the clothes he had on the night of the murders "now." [State's Exhibit 154: 17:27:25-17:07:30; 17:08:00-17:08:30; 17:09:45-17:09:50]. Appellant told the officers exactly where his pants were located, at Comet Cleaners, and gave his consent for the officers to collect them. [RR. IV: 47; State's Ex. 154: 16:24:10-16:24:25].

The State alleges that Appellant provided shirts to the police that had been washed and did not match the shirt described by witnesses. [*See* State's Brief, p. 27]. The flaw in this position is that many of the witnesses were inaccurate in their description of what Appellant was wearing that night. [RR. IV: 139-140]. Even the Miyako's employees disagreed as to what type of shirt Appellant had on that night. Danielle Donnelly testified that Appellant had on a "dark green shirt with really ugly gold horizontal stripes." [RR. VI: 30]. Mr. Soupradith described

the shirt as a "dark blue T-shirt." [RR. VI: 59-60]. Mr. Sawyer described Appellant's shirt as "kind of a, like a blueish shirt, kind of." [RR. VI: 71].

Appellant told the police officers that he was wearing a white button down shirt. [State's Exhibit 153: 16:14:40-16:16:20]. Appellant explained that he was "cleaning around the house" and doing laundry on Saturday (June 28, 2008) and took some clothes to Comet Cleaners. [State's Exhibit 153: 16:16:00-16:16:20; State's Ex. 154: 16:24:10-16:24:25]. As previously noted, Appellant encouraged the police officers to go and get his clothing. That type of behavior does not lead to an inference that Appellant was worried there would be incriminating evidence on his clothing.

The State misconstrues Appellant's statements during his interview: 1) that "nothing bad happened;" and, 2) when asked if anything "bad happened," his response was "not to me." [*See* State's Brief, pp. 13, 27]. The full context of this conversation makes it clear that Appellant was not being callous or emotionless about the murders. Ranger Briley was, once again, leaning into Appellant and insinuating that Appellant and Richter were "having an affair." [State's Exhibit 153: 16:14:00-16:14:40]. When Briley asked "if anything bad happened Friday night," Appellant answered "not to me … do you mean did we get in a fight or something?" [State's Exhibit 153: 16:14:00-16:14:40]. Briley followed up with

"Did you see anything happen Friday night that was bad and not good?" and Appellant answered "no." [State's Exhibit 153: 16:14:00-16:14:40].

The State also emphasizes the fact that Appellant forgot he went to LaGrave Field for a car show the morning of June 28, 2008 when he was talking to the police. [*See* State's Brief, p. 26]. The State also attaches significance to the fact that Appellant had no cell phone activity at LaGrave Field. [*See* State's Brief, p. 26]. A cell phone only connects to a tower when it is being used. [RR. VII: 9-10]. The only reasonable inference that can be drawn from that is that the Appellant didn't use his cell phone while he was there. Appellant voluntarily came to the police department on June 28, and again on June 29, 2008. [State's Exhibit 153, 154, 165]. He was interrogated extensively by three different officers for several hours [State's Exhibit 153, 154, 165]. The fact that, at one point during these interviews, he left out the fact that he went to a car show at LaGrave Field is not incriminating. Appellant kept a day planner and the car show at LaGrave Field was in it. [RR. IX: 56]. Appellant told Lynn Harper he was going to the car show at LaGrave Field [RR. VIII: 95]. Additionally, Appellant historically attended car shows. [RR. VIII: 48, 55-56; RR. IX: 56].

Section I Conclusion

This Court has made it clear that it will not exercise its discretion review authority merely because a court of appeals "managed to get it wrong" because "doing so only tends to undermine the respective roles of this and the intermediate courts without significant contribution to the criminal jurisprudence of the State." *Arcila v. State*, 834 S.W.2d 357, 361 (Tex. Crim. App. 1992).

After thoroughly reviewing the evidence and applying the correct legal standard, the court of appeals concluded that there was no evidence presented which would allow a rational juror to reasonably infer that Appellant intentionally or knowingly caused the death of Robin Richter and Shawna Ferris. The court of appeals applied the correct legal standard and engaged in a comprehensive analysis of the record which addressed all of the State's arguments. Therefore, this Court should dismiss the State's petition for discretionary review as improvidently granted.

II. COURT OF APPEALS OPINION SHOULD BE AFFIRMED

If this Court declines to dismiss the State's petition, the Court of Appeals opinion should be affirmed. In addition to setting forth the proper legal standards of review (as detailed in "Argument and Authorities Section I" of Appellant's Brief, and incorporated herein), the court conducted a thorough analysis of all the evidence and the reasonable inferences to be drawn from that evidence.

Additionally, the Court of Appeals specifically noted that it had considered the combined and "cumulative force of all of the circumstantial evidence" in reaching its conclusion. *Ingerson,* 508 S.W.3d at 736 (*See Garcia v. State*, 367 S.W.3d 683, 687 (Tex.Crim.App. 2012). The Court of Appeals did not adopt a prohibited divide-and-conquer approach. *See Hacker v. State*, 389 S.W.3d 860, 873 (Tex.Crim.App. 2013). Nor did the appellate court conduct an alternative-hypothesis analysis. *See Taylor v. State*, 10 S.W.3d 673, 679 (Tex.Crim.App. 2000).

Based upon a detailed analysis of the record in Appellant's case, the Court of Appeals correctly held that the following inferences were speculation and not reasonable:

1) that Appellant and Richter's relationship was strained;

2) that, while at Miyako's, Appellant was upset with Richter due to her using him and her disingenuous feelings towards him;

3) that Appellant being the last known person seen with Richter and Ferris was an indication that he had murdered them;

4) that Appellant was in possession of the murder weapon when Richter and Ferris were killed;

5) the gunshot residue particles on Appellant's pants and in his car indicated he murdered Richter and Ferris;

6) Appellant's activity in the hours and days following the murders was suspicious and, therefore, indicative of guilt; and

7) Appellant's statements to the police were indicative of guilt. *Ingerson*, at 732-735.

In this case, there was circumstantial evidence from which jurors could have formed a strong suspicion of Appellant's guilt. However, "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Megan Winfrey v. State*, 393 S.W.3d 763, 769 (Tex.Crim.App. 2013).

A. Appellant's Relationship with Richter

Appellant incorporates all of the facts and arguments presented in Section I(B)(1)(a) (pages 15-19) of his brief in this section.

The Appellant's relationship with Richter prior to June 27, 2008 was a significant part of the State's case as far as motive was concerned. As Appellant detailed in Section I(B)(1)(a) (pages 15-19), the State's theory on this issue is simply not supported by the record. It was Richter who sent Appellant a provocative text message of her breasts. [RR. IV: 124-125; RR. V.: 232-233]. Significantly, Appellant never responded with sexual pictures of himself.

The State's theory that Appellant was providing large sums of money to Richter was refuted by Richter's bank records showing Appellant did not provide money to Richter [RR. Vol VI: 213-216; RR. IX: 32-33; Defendant's Exhibit 2]. Testimony from two individuals very close to Richter, her daughter and T.L., confirmed that Appellant and Richter were only friends. [RR. V: 30, 182-183].

The State misquotes the record as to what Appellant said on this topic. Appellant never told the police that Richter treated him like a dog or embarrassed him. [State's Exhibit 154 at 17:19:00 – 17:20:30].

The Court of Appeals applied the proper legal standard and correctly determined that to conclude that Appellant wanted to be anything more than friends with Richter was mere speculation. *Ingerson*, at 732-733. Even when the evidence regarding Appellant's relationship with Richter is examined in the light most favorable to the jury's verdict, characterizing Appellant as some sort of spurned lover amounts to mere speculation.

B. Appellant's Demeanor and Actions Towards Richter and Ferris the Night of the Murders

Appellant incorporates all of the facts and arguments presented in Section I(B)(1)(b) (pages 19-22) of his brief for purposes of his argument in this section.

The numerous witnesses from Miyako's refute the State's contention that Appellant was upset with Richter the night of her murder. Mr. Soupradith testified that neither Richter nor Ferris were offended by Appellant's use of a racial slur. [RR. VI: 45]. In fact, the two women didn't appear to "pay any attention" to this statement. [RR. VI: 45]. Based upon his past experience with Appellant, Mr. Soupradith stated that Appellant sometimes used the "F word" and the "N word." [RR. VI: 46]. When he did, the employees at Miyako's would usually "kind of

blow it off." [RR. VI: 46]. In fact, that kind of language was "common, normal, everyday occurrence" at the Miyako's bar from customers other than Appellant. [RR. VI: 54-55].

While Richter was in the bathroom, Thomas Sawyer overheard Ferris say to Appellant "that would not be all right, because she is like a sister to me." [RR. VI: 68]. Mr. Sawyer did not know what Appellant said to Ferris to illicit this response but Ferris was not offended by it. [RR. VI: 70].

When one of the other patrons indicated that Richter had "groped him," Appellant apparently chastised Richter. [RR. VI: 85]. Brandon Krider, a bartender who witnessed this, did not describe Appellant as animated, upset, or angry during his interaction with Richter and Ferris. In fact, Krider did not see "anything out of the ordinary about the interaction" between Appellant and Richter and Ferris that night. [RR. VI: 95].

David Cook, the individual who had his crotch grabbed by Richter testified that Appellant did not appear to be upset by this. [RR. VI: 102-103, 123-124]. Mr. Cook stated, at some point in the evening, Richter and Ferris left Miyako's and Appellant stayed. [RR. VI: 103-104, 109]. Mr. Cook testified that he had a conversation with Appellant at that point; just "normal bar banter." [RR. VI: 104]. Mr. Cook, spoke to Appellant, Richter, and Ferris at Richter's car in the parking lot. [RR. VI: 113-114, 118]. This was at about 11:50 to 11:55 p.m. [RR. VI:

128]. Mr. Cook did not observe any animosity or tension between Appellant and Richter and Ferris in the parking lot. [RR. VI: 128].

The most incriminating thing that can be said about Appellant's behavior at Miyako's and in the parking lot is that he was the last known person seen with Richter and Ferris. As the Court of Appeals correctly pointed out, "Mere presence of a person at the scene of a crime either before, during[,] or after the offense, or even flight from the scene, without more, is insufficient to sustain a conviction as a party to the offense." *Ingerson,* at 733. (citing *Thompson v. State*, 697 S.W.2d 413, 417 (Tex. Crim. App. 1985), *accord Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). *See also Ellis v. State*, 551 S.W.2d 407, 412 (Tex. Crim. App. 1977)(some citations omitted).

C. Attributing Ownership of The Type of Gun and Ammunition Used in The Murders to Appellant

Appellant incorporates all of the facts and arguments presented in Section I(B)(1)(c) (pages 23-29) of his brief for purposes of his argument in this section.

Whether the State can circumstantially link the murder weapon to Appellant is, obviously, a critical issue in this case. The Court of Appeals went into great detail analyzing the testimony of each witness on this important topic. The bottom line is that it is mere speculation to conclude that Appellant was in possession of any of the handguns that Calvin Story described as the possible murder weapon. [[State's Exhibit 56]. As Mr. Story made clear, the recovered bullet could have

been fired from any .38 or .357 Colt revolver currently present in the United States. [RR. V: 67].

There's no direct evidence connecting the bullet found in Richter's vehicle to any gun Appellant has ever owned. [RR. IX: 18]. The gun that the State wants to link to Appellant is a bobbed hammer Colt .38 revolver that Appellant purchased from James Elrod in 1999 [RR. IV: 149-150, 169-170]. The gun Mr. Wayman saw in Appellant's, vehicle, on June 28, 2008, does not fit this description because it was a Smith and Wesson with a distinct hammer. [RR. VIII: 29-30, 41-42, 45-46; state's Exhibit 172]. Additionally, none of the guns at Appellant's house matched the murder weapon [RR. IV: 51; IX: 18; State's Exhibit 56].

Appellant did not return from Indiana with 130-grain bullets (the weight of the bullet recovered from Richter's vehicle). [RR. IV: 239-240]. Contrary to the State's assertion that 130-grain bullets are rare, their own expert testified they are common. [RR. V: 70]. Additionally, a Colt .38 belonging to David Hill could not be eliminated as having fired the recovered bullet. [RR. V: 42-44: State's Exhibit 58]

The circumstantial evidence does not lead to a rational inference that Appellant was in possession of a firearm that was consistent with firing the recovered bullet. Although Appellant may have been in possession of such a

revolver at one point, there's no evidence to support the theory that he had possession of such a weapon on the night of the murders The Court of Appeals conducted the proper analysis and correctly decided that such a conclusion would be pure speculation.

D. Appellant's Behavior After the Murders

Appellant incorporates all of the facts and arguments presented in Section I(B)(1)(d) (pages 29-31) of his brief for purposes of his argument in this section.

The State describes Appellant's driving that night as "panic, disorientation, and flight." [*See* State's Brief, p. 18]. A review of State's Exhibit 1 does not support this position. State's Exhibit 1 is a surveillance camera from the Little Miracles Daycare Center. [RR. IV: 213-214]. It depicts traffic from 11:30 p.m., June 27 to 12:30 a.m., June 28 at the intersection of Crites and 51 South. [RR. IV: 215, 66]. During that hour, over fifty vehicles are captured driving on 51 South. [State's Exhibit 1]. Except for the pickup trucks, tow trucks, and 18-wheelers, the vehicles are indistinguishable from one another. The vehicle that is captured by the camera at 00:02:12 may well be the Appellant's vehicle. [RR. IV: 67-68]. As previously noted, the Appellant did not deny he might have passed his street when he was driving home that night. [State's Exhibit 198: 23:05-24:11]. Assuming the jury inferred the vehicle was Appellant's, there is simply nothing panicked or disoriented about the way the

vehicle was driven. [*See* State's Exhibit 1: 00:02:12-00:02:40]. The car is not moving exceptionally fast, it doesn't screech to a halt, and it makes a normal turn after it backs up. [*See* State's Exhibit 1: 00:02:12-00:02:40].

A review of the entire video shows that many other cars were driving faster than Appellant's on 51 South that night. [*See* State's Exhibit 1: 00:02:12-00:02:40]. It is not reasonable to categorize Appellant's driving as "frantic" or "flight," or to infer guilt from approximately 30 seconds of driving. The Court of Appeals correctly held that to do so amounted to mere speculation.

The State's reliance upon *Clayton v. State,* 235 S.W.3d 772 (Tex.Crim.App. 2007) is misplaced. In *Clayton*, the defendant's bloody fingerprints were found in the decedent's car and Clayton admitted to being in the car as the decedent was dying. *Clayton*, at 775, 776-777. Clayton admitted he knew the victim was dying but he fled the scene and didn't call 911. *Clayton*, at 777. Under those circumstances, this Court noted that a "factfinder may draw an inference of guilt from the circumstance of flight." *Clayton*, at 780. The facts of Appellant's case fall far short of those in *Clayton.*

The State argues that Appellant's comments to a Kwik Kar employee are suspicious. [*See* State's Brief, p. 26.]. The Appellant lived across the street from the Kwik Kar and took his car there to be serviced almost every month. [RR. VI: 196-198; 249-250; State's Exhibit 152]. He knew the employees and they knew

him. [RR. VI: 249-250]. Appellant's making small talk about who he was dating or who he broke up with is certainly no indicator that he recently murdered someone.

Likewise, there is nothing suspicious about the Appellant taking his clothes to the dry cleaner on June 28, 2008. Mr. Marlowe testified that he knew Appellant well and it was not unusual for him to bring in one pair of pants and one shirt on a Saturday. [RR VII: 189, 196-197].

The Appellant's activities were corroborated by his girlfriend, Lynn Harper. As detailed previously, Ms. Harper was not "surprised" by Appellant's phone call at 12:15 a.m. the morning of June 28, 2008. That was a little later than usual but, she and Appellant had talked earlier about possibly getting together that night.

The Court of Appeals analyzed the testimony of every witness regarding Appellant's behavior after the murder under the proper legal standard. After doing so, the court correctly concluded that it was not a reasonable inference to conclude that Appellant's behavior was suspicious.

E. Appellant's Recorded Interviews with Police

Appellant incorporates all of the facts and arguments presented in Section I(B)(1)(e) (pages 32-34) of his brief for purposes of his argument in this section.

Appellant cooperated with the police at every turn, agreeing to three voluntary interviews, consenting to a search of his vehicle, and asking the

officers to get his phone records and clothes. At the beginning of the first interview, Det. Haught apologized to Appellant for making him wait so long [State's Exhibit 165: 18:47:30-18:47:00]. Ranger Briley testified that Appellant's incorrect statements about his timeline the night of the murders was due to him being confused about what time the bar closed as opposed to any attempt to deceive. [RR. VIII: 162-163].

The Court of Appeals examined the Appellant's interaction with the police under the proper standard and correctly held that Appellant's actions did not lead to a reasonable inference that he committed the murders.

F. The Forensic Evidence as Incriminating to Appellant is Weak

There was no biological evidence such as DNA, hair, or blood splatter connecting Appellant to the murders of Richter and Ferris. [RR. IV: 93-95; RR. IX: 19-22]. There was no evidence of this type on Appellant's clothing, on his shoes, in his car, in his house, or in Richter's vehicle. [RR. 93-95].

Based upon the information provided by Appellant, and his consent, one of the detectives called the owner of the cleaners, James Marlowe, and arranged to pick up Appellant's clothing. [RR. IV: 48]. Mr. Marlowe met the detective at the cleaners with his daughter, Chandra Ehardt, who provided Appellant's clothes to the officers. [RR: VII: 187]. Mr. Marlowe testified that he knew Appellant well

and it was not unusual for him to bring in one pair of pants and one shirt on a Saturday. [RR VII: 189, 196-197]. Mr. Marlowe indicated that Appellant's clothes had been comingled with other clothing in a laundry bag and then in a buggy. [RR. VII: 198-201]. The laundry bags were rarely cleaned. [RR. VII: 200]. Mr. Marlowe testified that he had customers that were police officers, DPS officers, and Sheriff's deputies. [RR VII: 206]. Mr. Marlowe had "a lot" of customers who "own" and "shoot" guns. [RR. VII: 206].

Chandra Ehardt testified that she was the person who assisted the police officers in retrieving Appellant's clothes. [RR. VII: 207]. Her testimony was consistent with her fathers as to where Appellant's clothes were located. [RR VII: 211-21]. She also agreed that "dozens and dozens of customer's clothes go through the laundry bags before the bags are laundered. [RR. VII: 217]

Brent Watson testified that he collected gunshot residue evidence stubs from the following locations on Appellant's pants: the front portion, the inside pockets, and the interior waistband. [RR. IV: 263]. On August 28, 2008, Mr. Watson collected gunshot residue evidence stubs from the driver's side front floorboard area of Appellant's vehicle. [RR IV: 267].

Appellant's father gave consent for the officers to search his house (the house where Appellant lived). [RR IV: 50]. Inside the house, the officers observed the following handguns: a .44 Special, a Colt 1911 ,45, a Colt .25, and a Savage

.32. [RR IV: 51]. None of those guns were the murder weapon. [RR. IV: 51, 108; IX: 18; State's Exhibit 56].

Phillip Stout testified that he worked for the Texas DPS in the trace evidence section. [RR. VII: 233]. Mr. Stout conducted gunshot residue (GSR) testing on the stubs collected by Mr. Watson. Mr. Stout testified that his examination of the GSR stub from Appellant's pants revealed: one characteristic, or three-component particle; and three indicative, or two-component particle. [RR. VII: 243]. His examination of the GSR stub from Appellant's vehicle's floorboard revealed one indicative particle. [RR. VII: 243].

According to Mr. Stout, his findings with regard to the stub from the pants were consistent with the pants having been (A) in the immediate proximity of a weapon as it was fired, or (B) contacting a surface with gunshot primer residue particles. [RR. VII: 245; State's Exhibit 177]. His results with regard to the stub from the floorboard were consistent with (A) the particle originated from environmental sources, (B) characteristic gunshot particles were deposited but were removed, or (C) weapon/ammunition combination does not consistently produce characteristic gunshot primer residue particles but only indicative. [RR. VII: 245; State's Exhibit 177].

Mr. Stout testified that the particles found on Appellant's pants could have been transferred from other clothes at the dry cleaners. [RR VII: 246-247, 260].

In fact, Mr. Stout testified that the transfer of the gunshot residue particles from a counter at a dry cleaners was "just as possible" as the pants being in the proximity of a firearm. [RR VII: 250]. Mr. Stout went further and stated that Appellant's pants could have gotten one characteristic and three indicative particles by coming into contact with "some surface on the planet that had gunshot residue on it." [RR. VII: 251]. Additionally, the particles are molten metal and not easily biodegradable. [RR. VII: 251]. Therefore, the particles "hang around for a long time." [RR VII: 251].

With regard to the indicative particles, Mr. Stout testified that there are "many more sources of environmental contamination to create those." [RR. VII: 255]. These sources include: brake pads, automobile electricians, car radio installers, and furniture finishers. [RR VII: 255].

When discussing all the possible ways that the gunshot residue particles could have gotten on Appellant's pants and his floorboard, Mr. Stout concluded that he couldn't put "any likelihood" on one scenario versus another. [RR. VII: 262].

At first glance, the GSR evidence appears damaging to Appellant. Mr. Stout provided numerous scenarios in which the minimal amount of GSR particles could have gotten onto Appellant's pants and floorboard of his vehicle. The GSR particles certainly don't link Appellant to the murder weapon in this case. Based

upon the evidence and the testimony of the State's expert, it is apparent that attributing the murder weapon to Appellant based upon the GSR evidence amounts to mere speculation.

Section II Conclusion

The Court of Appeals, in an exceptionally detailed opinion, applied the proper legal sufficiency standards and reached the correct conclusion in Appellant's case. The court considered "all the evidence in the light most favorable to the verdict" and determined that, "based on that evidence and reasonable inferences therefrom, a rational juror could not have found the essential elements of the crime beyond a reasonable doubt." *Ingerson,* at 730 (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); 1987).

The court also properly considered circumstantial evidence noting "[C]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Ingerson, at 730* (citing *Guevara*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004). In Appellant's case, the circumstantial evidence amounts to a strong suspicion, at best. Therefore, this Court should affirm the Court of Appeals' opinion in Appellant's case.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court will dismiss the State's petition for discretionary review as improvidently granted. Alternatively, Appellant prays this Court will affirm the Court of Appeals' opinion reversing Appellant's conviction and rendering a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I, Scott Brown, attorney for Appellant, FRED EARL INGERSON, III, certify that this document was generated by a computer using Microsoft Word 2013, which indicates the word count of this document is 11,539 per Tex.R.App. 9.4(i).

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